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Supreme Court of the United States

OCTOBER TERM, 1953

No. 23

WALTER J. KOWALSKI,

Petitioner,

v.

ALBERT B. CHANDLER, individually and as Commissioner of Baseball, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

The players' activities directly touch all activities of Organized Baseball both interstate and local.

A. The Economic Tie Up Between the Players' Performance and Organized Baseball's Commerce Activities.

Organized Baseball argues that the professional ball player is analogous to a worker in a mine or on a sugar plantation. That if mining companies or sugar companies were to combine and immobilize the miners or the planters, the effects felt in the labor market, in the consumers' market, and in the calculus of marginal costs, would not be Sherman Act damage to the miners, to the planters, to the consumers, or, to other entrepreneurs. They say that any such enslavement of labor, however vast, would be but an intrastate segment of business operations. This analogy is entirely ill-conceived. By way of contrast we put two illustrations:

1. A company makes automobiles which it ships and sells over the nation. The labor is of assembly line variety and put into the manufacture of the car is a cost thereof; the materials are costs; the overhead, shipping, sales and general and administrative expenses are costs. The finished cars reflect these costs and are presumably sold at profit.

2. Now we illustrate Organized Baseball: There is no inventory for sale other than the players' performance. The cost of performance cannot be uniform or graded into weekly wage, hourly wage or ordinary labor standards. The players are not tweedledee and tweedledum but have economic stature. They have for exchange professional service, drawing power, special personality and tempera-

ment values. In one sense they are entrepreneurs. In another sense their skills and performance value become the stock in trade of Organized Baseball. To them are attributable Organized Baseball's good-will, potential income, position in the advertising field and in the channels of commerce. These aspects coalesce to reach directly into every economic activity of Organized Baseball in the ball parks and in hard and fast bargaining with sponsors, advertisers and big business, and in its existence as a going concern through the build-up of goodwill. Through engrossing the players by the reserve clause and the farm system, the entire "inventory" of players is kept without a margin of opportunity, except in limited exceptions and lucky circumstance. After engrossing the inventory of players' skills, Organized Baseball exhibits it on the field and on radio and television. Its own accounting assets of goodwill are increased by such interstate activities. The players create the public interest in themselves and perpetuate it as the asset of goodwill for Organized Baseball; but being engrossed, have no margin of fair opportunity to realize on limited athletic life. Through the asset of goodwill, and its build up by the player, Organized Baseball derives large profits as a medium of advertising and becomes the nub of commercial activity. All at no extra cost to itself. Every activity touches the players. They are the product, the inventory, the goodwill, the show, the broadcast, the television, and largely the direct cost. Only they can be injured, and they clearly are by the combination and monopoly.

B. Further Aspects of the Impact of Player-Activities on Interstate Commerce—An Accounting Demonstration.

Organized Baseball's position is as follows:

They now say that many of their activities are interstate commerce; the player is not. Therefore, restraints on players have no effect on interstate commerce. Con-

cretely put, it comes to this:

A		B
Sponsors	THEY CLAIM	Performance by Players
Advertisers		Farm System
Radio and Television	ARE	Reserve Clause
Transmission of Play by Play	ISOLATED	Exclusive Control over Players
Any and all other interstate commerce	FROM	Exclusive Control over Games
		Any and all other restraints on player market

Baseball's Formula: No matter what they do with "B", that can never affect "A".

And yet it is evident that:

(a) The product in transmission by television and broadcast is the player.

(b) The advertising copy in transmission by television and broadcast is the player. He is analogous to a poster sent in the mails.

Not only do (a) plus (b) equal interstate commerce plus dollars from interstate commerce, but these show up as Goodwill on the balance sheet of Organized Baseball. This produces more Goodwill and further revenues from interstate sources. All this at no extra cost to Organized Baseball; yet the players, who are directly involved and the direct participants, are deprived of all margin of opportunity to reap any advantage from such interstate activities. If the player could move about and command a price for his service, he could share in the marginal re-

turn of his interstate activities. But by pressing a button on the players, Organized Baseball taps the flow of interstate revenue, dominates interstate activities and waxes large.

A synthesis of this is as follows:

The value of good will of the enterprise known as Organized Baseball consists of (a) the number of patrons at the park; (b) the number of patrons of the radio broadcasts; (c) the number of patrons viewing television.

Each club may be said to have a separate good will under these items, with an overall for the combination as a whole. It is elementary that money spent in creating public interest increases the good will of a going business. To this extent, good will is a capital asset. Money spent in creating value for it is economic gain to that asset.

Organized Baseball, as had been pointed out, has increased attendance since 1939 by upwards of ten (10) million per annum. This coincides with the television period of bringing the game by sights and sounds into every hamlet of the country.

The revenues—which would ordinarily be spent by Organized Baseball for advertising of its business and schedule—are saved to it by reason of the fact that it has found other business and manufacturing enterprises willing to conjoin and utilize the baseball performance—the exhibition itself—as the means of carrying additional advertising of their products: beer, cigarettes, gas and oil, among others.

This means, in an economic sense, that baseball is getting maximum good will broadcasts without expenditure of additional overhead, besides collecting revenues for permitting the conjoined use of the exhibition by the other trades and enterprises.

Formulas for this would be:

Players' Performance →	Patrons In Park, Radio and Television + Sponsors + Revenue	A—Goodwill for Organized Baseball	(Capital Asset)
		B—Goodwill for Sponsors	(Capital Asset)
		C—Goodwill for Player	(Margin of Opportunity)

1. Organized Baseball Receives:

   A + $ = Capital Asset + Revenue to Organized Baseball

   At no extra cost.

2. Sponsors Receive:

   B and Pay $ for this = Capital Asset for Organized Baseball + Revenue to Organized Baseball

3. Player Receives:

   C (Margin of Opportunity) Then deprived of this = Capital Asset + Revenue for Organized Baseball

In all of these formulations the players' performance is the major key. Take this out and you find zero in each formula. Thus no players—no exhibition, no broadcast, no revenue; no additional good will; no broadcast revenue income and no increase of good will; no business.

It follows that the players' presence, their actual play, the simultaneous utilization of their actions, for the pur-

pose of sight and sound broadcast and telecast become the key to good will dollars running into millions. It is our submission that Organized Baseball by taking the economic margin of fair opportunity from the players such as Toolson and Kowalski and keeping them shackled under the reserve clause, directly affects the commerce, in respect of good will dollars.

C. The Minor League Player Has Been Damaged in His Trade.

The expansion of the reserve clause, the farm system, the international agreements, all make for a monopoly of manpower to perpetuate the easy control of the players as chattels. A club in Baseball has the right to broadcast, to have good will created for itself, to conjoin and broadcast the exhibitions with beer or other products and to effectuate these purposes over every interstate channel it may believe requisite. But to do this does not require legal sanction of the unrestricted reserve clause reducing the performers to peonage, and reducing their marginal opportunity to that of virtual slavery and dictation. The players have but 6.3 years of average major league life; they are systematically retained in the minor leagues by abolition of the unrestricted draft or right of selection—their average age in reaching the Majors has increased over the past seventy five (75) years from 22 to 27 (Peter S. Craig, Monopsony in Manpower, Organized Baseball Meets the Antitrust Laws, 62 Yale Law Journal 576, 597, Note 105). The quality of performance cannot be measured quantitatively; as competitors for position, normal concepts of seniority, hourly wages, standard wages do not help them and would not help. All that 'organization' could bring are fringe benefits relative to pensions, accidents and night baseball. These could be beneficial but do not touch the root: the margin of opportunity to make a return at the opportune time for professional work while competing against each other. By the unrestricted reserve,

players who could exchange professional ability for return of money and publicity and afford to themselves a future as quasi public figures, are stumped and kept in oblivion.

Unless the players are given margins for opportunity they are doomed to the limbo of professional peonage. While Organized Baseball has set no limit to what it can increase dollar wise in respect of interstate and international good will activities specifically on radio and television by reason of the players' performance, it has diminished to a minimum the individual minor league players' economic margin of obtaining any fair sum for his future professional good will.

Therefore, there is a direct connection and clear damage.

II

Other positions of respondents are untenable.

1. The Congressional Subcommittee represented the eyes of the government in investigating Organized Baseball (*United States* v. *Rumely*, 345 U. S. 41, 43). The facts which it has reported are admissible in evidence unless grounds for objection to them upon the trial can be sustained (*cf. Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 155).

2. The reserve clause cannot equalize the Major League pennant races in the presence of The Farms. The dominance of The Yankees and The Dodgers establishes this fact.

3. This litigation does not involve the customary collision between the respective powers of national and state sovereignties. Unless Organized Baseball is subjected to national authority, it is pragmatically not amenable to effective regulation. (Organized Baseball—Report of The

Subcommittee on Study of Monopoly Power of The Committee on The Judiciary House of Representatives—82nd Congress, Second Session, 144, hereinafter referred to as the "Report"). In plain language, Organized Baseball except for Sunday games has proverbially escaped state legislation (Constitutional Law—Baseball and The Anti-trust Laws—A game or a conspiracy? 24 Notre Dame Lawyer, 372, 382).

4. The scientific parallel between interstate telegraphy and radio and television served to insulate the broadcaster from state taxation under the Federal Radio Act of 1927, 44 Stat. 1162 (*Fisher's Blend Station* v. *Tax Com'n.*, 297 U. S. 650). Broadcasting and telecasting, however, at all times by their very nature transcend state lines; are national in scope; and are subject to the commerce clause (*Fisher's Blend Station* v. *Tax Com'n.*, 297 U. S., *supra*, 655). In 1934 the Federal Communications Act 47 U. S. C. Secs. 201-221, differentiated the telegraph from radio and television by recognizing the former as a common carrier activity and the latter within the field of free competition (*Commission* v. *Sanders Radio Station*, 309 U. S. 470, 474). Consequently, the contracts between the clubs of Organized Baseball and the sponsors and broadcasting companies for the transmission of the sights and sounds of the games are part and parcel of interstate and international commercial advertising within the scope of the Sherman Act (*Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 233; *Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255). Amusements or cultural pursuits conducted at various localities are within the Sherman Act whenever they are conducted as monopolies (*Alden-Rochelle, Inc.* v. *American Soc. of C., A. and P.*, 80 F. Supp. 888— D. C. S. D. N. Y.; *Greenleaf* v. *Brunswick-Balke-Collender Co.*, 79 F. Supp. 362—D. C. E. D. Pa.).

5. Counsel for the Leagues in *Federal League Club* v. *National League*, 259 U. S. 200, proved from testimony upon the trial that the clubs did not hold the players under reserve by the imposition of a blacklist or otherwise against their own volition (Record on Appeal, ff. 695-696, 700, 738-741; 782-784; 805; see, *id.*, Brief of defendants—in error, p. 22). This is the factual basis for the conclusion that the interstate transportation of "free persons" by the Leagues was incidental (*Federal League Club* v. *National League*, 259 U. S., *supra*, 208-209). One authority has consistently failed to read the record in that case in his attempts to explain what Mr. Justice Holmes held in rendering the decision therein for this Court (Thomas Reed Powell, Insurance as Commerce, 57 Harvard Law Review, 937, 960; Cf. John W. Neville, Baseball and the Antitrust Laws, 16 Fordham Law Review, 208). The Federal League had succeeded in poaching upon the Major Leagues with impunity for its clubs and the "jumping" players (Federal League Club case, Record on Appeal, ff. 287-288; 382-383). The distinction between the players as "free persons" in the era of the *Federal League Club* case and the monopoly that Organized Baseball is now wielding over them is material in the strictest commerical sense. Organized Baseball uses these men as assets (Report 47-48; 61-62; 65; 125; Hearings Before the Subcommittee on Study of Monopoly Powers of the Committee on the Judiciary, House of Representatives, 82d Congress, First Session, 640; Exhibit No. 43-J, 673, at 677; 754; 986-987; 1005; Gallagher to Chandler 8-8-46, 1079) to maintain and expand its control over interstate and international advertising through the sale of broadcasting and telecasting rights to producers (*Mandeville Farms* v. *Sugar Co.*, 334 U. S., *supra*, 230, note 9; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469; *United States* v. *Lowden*, 308 U. S. 225; *Gardella* v. *Chandler*, 172 F. 2d 402; and see opinion of Judge Hand in *United States* v. *Gold*, 115 F. 2d 236).

It is unnecessary to reply to Organized Baseball's contentions against petitioners in the Corbett petition. The economic and accounting factors illustrated in this reply plainly develop that the Minor League owner is deprived of his economic margin of opportunity to develop and increase goodwill and engage in the admitted interstate activities, and has been damaged by the combination and monopoly.

III
CONCLUSION

It is respectfully prayed that the judgment be reversed.

Respectfully submitted,

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